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Supreme Court, U.S.
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In The

Supreme Court of the United States

PHILADELPHIA, BETHLEHEM AND NEW ENGLAND RAILROAD COMPANY,

Petitioner,

v.

DAVID NEWHARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's dicta in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253, 254 (1963), regarding the collateral source rule and disability benefits precludes introduction into evidence of a company-funded, regular retirement pension that is unrelated to the claimed injury.

2. Whether the decision in *Eichel* regarding the collateral source rule is misapplied when it is construed to mandate the per se exclusion of evidence of payments under the Railroad Retirement Act of 1974, 45 U.S.C. § 231 *et seq.*

3. Whether this Court's decision in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490 (1980), requires the deduction of Railroad Retirement Taxes, as well as federal, state and local income taxes, from gross wages when determining damages.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to petitioner Philadelphia, Bethlehem & New England Railroad Company ("PBNE") and respondent David Newhard ("Mr. Newhard"), the Association of American Railroads appeared in the Court of Appeals as *amicus curiae* in support of PBNE, and the Academy of Railway Attorneys appeared in the Court of Appeals as *amicus curiae* in support of Mr. Newhard. PBNE's parent company is Bethlehem Steel Corporation.

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OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-7a) is unreported. That opinion affirmed the relevant unreported oral and written orders of the District Court made prior to before and during the trial of this matter (App., *infra*, 8a-13a), which resulted in the District Court's entering of a Judgment on June 9, 1997 reflecting a jury's verdict of 95% negligence on the part of the Philadelphia, Bethlehem, and New England Railroad Company ("PBNE") and a jury award of $582,992.20, after molding (App., *infra*, 14a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision is the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, which is reproduced in full in the Appendix (App., *infra*, 15a-20a).

STATEMENT

On February 2, 1995, respondent, David Newhard, while acting as a conductor for the Philadelphia, Bethlehem and New England Railroad Company

("PBNE"), was injured during a movement of cars in the Bethlehem Steel steel plant.[1] (J.A. 215-18). Mr. Newhard returned to work at PBNE the very next day and continued working for over ten months until December 27, 1995. (J.A. 222, 230). On June 17, 1996, Mr. Newhard instituted this action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, in the United States District Court for the Eastern District of Pennsylvania.[2] (J.A. 2). In his Complaint, Mr. Newhard sought to recover damages for lost *future* wages and fringe benefits, as well as pain and suffering. (J.A. 2-7).

On September 12, 1996, having reached the anniversary of his 30th year of service with PBNE, Mr. Newhard voluntarily retired from PBNE. (J.A. 26-27). Significantly, at the time he chose to retire, Mr. Newhard had three options: (1) he could continue working at PBNE as he had done for the past ten months after his accident; (2) he could take a disability leave from PBNE which would have entitled him to receive a disability pension, retain his seniority rights at PBNE and return to his former job and former salary at any time; or (3) he could voluntarily retire and relinquish forever his employment rights at PBNE. (J.A. 244, 246). By choosing the third option, Mr. Newhard was able to receive both a disability retirement pension under the Railroad Retirement Act *and* a regular

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[1] The record has not been transmitted to this Court at the present time. Nevertheless, PBNE cites to the Joint Appendix ("J.A.") that was before the Third Circuit, as allowed by Supreme Court Rule 12.7 to support the factual statements made within this Petition.

[2] The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

company retirement pension. Further, by choosing the third option, Mr. Newhard could never return to work at PBNE.

Prior to trial, PBNE filed a Motion in Limine seeking to introduce evidence that Mr. Newhard was currently receiving a regular company pension, a pension which was funded entirely by PBNE and *not* paid on account of Mr. Newhard's injury. (App., *infra*, 21a-28a). Mr. Newhard likewise filed a similar Motion in Limine seeking to preclude PBNE from "making any mention, directly or indirectly, in any manner whatsoever . . . regarding [Mr. Newhard's] retirement." (App., *infra*, 29a-33a).

Concluding that this Court's decision in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963), governed the instant case, the District Court erroneously held that the collateral source rule barred any mention of the regular, company pension Mr. Newhard was receiving and therefore granted Mr. Newhard's broad Motion and denied PBNE's Motion.[3] (App., *infra*, 8a-9a). In addition, the

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[3] In addition, counsel for Mr. Newhard stated that his client would have worked until he was 65, a 10 year span, and that he considered his inability to continue employment at PBNE a significant loss. (J.A. 119). Likewise, Mr. Newhard, 52 at the time of his accident, testified that he did not want to retire until he was 62 or 65 and had it not been for his accident, he would be working at PBNE today. (J.A. 232, 241). This particular testimony was false and misleading because Mr. Newhard had voluntarily relinquished his employment rights at PBNE by taking a company retirement pension. During trial, PBNE argued that because Mr. Newhard and his counsel had "opened the door," on the retirement issue, PBNE should be permitted to introduce the fact of Mr. Newhard's retirement to the jury. (J.A. 243-48). The District Court disagreed (J.A. 248), despite the

District Court also denied PBNE's Motion in Limine seeking to introduce evidence of Mr. Newhard's annual receipt of approximately $20,000 in connection with a Railroad Retirement Act ("RRA") disability pension. (App., *infra*, 34a-46a, 8a-9a).

With those and other erroneous rulings,[4] the case proceeded to trial. During trial, PBNE also argued that

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myriad of case law which provides that once a plaintiff "opens the door," the defendant is permitted to offer collateral source payments into evidence. *See, e.g., Gladden v. P. Henderson & Co.*, 385 F.2d 480 (3d Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968) ("[T]he collateral benefit rule cannot be made a springboard from which a plaintiff may go forward with affirmative evidence . . . and then seek immunity from cross-examination regarding [that evidence]. The boundary of silence was crossed when plaintiff affirmatively presented on direct examination the reason why he had returned to work after seven weeks and had not again visited his physician."); *see also Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265 (2d Cir. 1996) (when plaintiff places financial status at issue, evidence of payments to plaintiff from collateral sources may come in, with limiting instruction); *Lange v. Missouri Pac. R.R.*, 703 F.2d 322, 324 (8th Cir. 1983) (holding that where plaintiff testified that he went back to work immediately following surgery because he had no savings or disability income, defense could introduce evidence on availability and eventual payment of disability payments on cross-examination).

[4] The Third Circuit further erred when it affirmed the District Court's decision not to allow PBNE to rebut Mr. Newhard's testimony that he had a "good" disciplinary record at the railroad. (J.A. 207). Although Mr. Newhard again "opened the door" on this issue, the District Court refused to allow PBNE to introduce evidence that Mr. Newhard had been suspended for nearly two years for gross insubordination. (J.A. 292-294). This ruling, too, was unsupported by case law. *See United States v. Sheeran*, 699 F.2d 112, 119 (3d Cir.) (evidence concerning witness' testimony in previous trials properly admitted where

Mr. Newhard's lost wages calculations should be reduced by the applicable Railroad Retirement tax that, like income tax, would be withheld from each and every one of his paychecks. (App., *infra*, 10a-13a). The District Court, however, prevented PBNE from cross-examining Mr. Newhard's economist on the issue of Railroad Retirement taxes which, like income taxes, are withheld from a railroad employee's gross wages. (App., *infra*, 12a).

The case was submitted to the jury on June 5, 1997. Unaware that Mr. Newhard had voluntarily retired and was currently receiving approximately $10,000 annually from a regular, company-funded pension and approximately $20,000 from an RRA disability pension and not instructed that any award of wages should be reduced by the applicable Railroad Retirement tax, the jury found Mr. Newhard only 5% contributorily negligent and awarded him damages and unreduced future lost earnings and benefits in the amount of $582,992.20, after molding. (App., *infra*, 14a). After its post-trial motion was denied, PBNE appealed a number of the District Court's rulings.

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the defense "opened the door"), *cert. denied*, 461 U.S. 931 (1983); *Benson v. American Export Isbrandtsen Lines, Inc.*, 478 F.2d 152, 154-55 (3d Cir. 1973) (evidence that plaintiff receives benefits admissible to refute impression created by plaintiff on direct examination), *cert. denied*, 414 U.S. 1145 (1974); *United States v. Lowe*, 234 F.2d 919, 921-22 (3d Cir.) (defendant was properly cross-examined concerning his financial well-being after his counsel mentioned it during opening statement and questioned him about it during direct examination), *cert. denied*, 352 U.S. 838 (1956). In addition, despite controlling precedent, the Third Circuit found harmless the District Court's error in allowing Mr. Newhard's counsel to comment on Mr. Newhard's ineligibility for workers' compensation. (J.A. 100-01).

The United States Court of Appeals for the Third Circuit affirmed finding that the District Court had not abused its discretion by excluding evidence of Mr. Newhard's retirement and his receipt of a retirement pension. (App., *infra*, 4a). Without discussing the purpose and requirements of the collateral source rule and without addressing PBNE's arguments on this issue, the Third Circuit held that this Court's dicta in *Eichel* – that the defendant railroad did not dispute that evidence of *disability* payments received by a former railroad employee under the Railroad Retirement Act ("RRA") was barred by the collateral source rule, *see* 375 U.S. at 254 – applied to support the District Court's exclusion of evidence of Mr. Newhard's receipt of a company-funded, regular retirement pension and the disability pension. (App., *infra*, 4a-6a). In addition, the Third Circuit concluded that the payment of income taxes and the payment of the Railroad Retirement tax differed fundamentally and thus declined to extend this Court's holding in *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980). (App., *infra*, 6a-7a).

REASONS FOR GRANTING THIS PETITION

This Court should grant review to resolve the misapplication and overextension by lower courts of the collateral source rule first articulated by this Court in *Propeller Monticello v. Mollison*, 15 U.S. (17 How.) 152 (1854), and first mentioned by this Court in the context of a FELA case in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253

(1963).[5] The collateral source rule was never intended to and does not apply to a company-funded, regular retirement pension. In addition, there is disagreement among the circuit courts concerning the import of this Court's dicta in *Eichel*. This conflict needs to be addressed and resolved by this Court to bring uniformity to decisions regarding the application of the collateral source rule. Otherwise, future cases will continue to misapply *Eichel* and will continue to expand the collateral source rule's boundaries well beyond those contemplated by this Court.

Moreover, the purposes of the collateral source rule have been eroded by the shift in emphasis in tort law from deterring the wrong-doer to compensating the injured party regardless of fault. Retaining the collateral source rule results in an expensive liability system that overcompensates plaintiffs and imposes unnecessary costs upon the average consumer. This Court should therefore abolish the judicially-created collateral source rule, or at the very least, modify its application in the context of FELA cases, so that plaintiffs are limited to one full recovery, thus reducing the financial burden on society and industry.

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[5] This Court has often granted certiorari where lower courts have misapplied its prior decisions. *See, e.g., Schlude v. Commissioner*, 372 U.S. 128, 130 (1962) ("We brought the case back once again to consider whether the lower court misapprehended the scope of *American Automobile Association*, 370 U.S. 902."); *Braen v. Pfeifer Transp. Co.*, 361 U.S. 129, 130 (1959) (granting petition for certiorari where court of appeals' decision "seemed to be out of line with the authorities").

Further, the Third Circuit's and the District Court's failure to extend this Court's holding in *Liepelt* that income taxes must reduce an award of gross wages is illogical and inconsistent with a plaintiff's entitlement to a "realistic measure" of future income as articulated by this Court.

Finally, bold tort reform is undoubtedly beyond the power of this Court. Nevertheless, this Court, and all courts, have the obligation not to perpetuate, let alone extend, judicially-created doctrines that impose undue and improper burdens beyond the anticipated effect of those doctrines.

I. THE COLLATERAL SOURCE RULE SIMPLY DOES NOT APPLY TO A PLAINTIFF'S RECEIPT OF A COMPANY-FUNDED, REGULAR RETIREMENT PENSION RECEIVED NOT ON ACCOUNT OF PLAINTIFF'S INJURY

The collateral source rule provides that a tortfeasor may not introduce evidence of payments received by the injured party from a collateral or independent source *on account* of his injury in order to reduce the amount of damages owed. *See Propeller Monticello v. Mollison*, 15 U.S. (17 How.) 152 (1854) ("The defen[s]e . . . that the [injured parties] have received satisfaction from the insurers . . . cannot avail the [tortfeasor]."); *see also The Atlas*, 93 U.S. 302, 310 (1876) ("[N]or is the guilty party . . . entitled to deduct from the amount of the damages any sum which the libellant has received from an underwriter *on account of the same injury*, the rule being, that a wrong-doer in such a case cannot claim the benefit of the contract of insurance if effected by the person whose property he has

injured.") (emphasis added); *Leeper v. United States*, 756 F.2d 300, 303 (3d Cir. 1985) ("Generally, the collateral source rule allows the victim of a tort to recover for damages caused by the tortfeasor regardless of compensation received from other independent or 'collateral' sources."). This Court's articulation of the collateral source rule in *Atlas* leaves no room for doubt that, to be within the reach of the collateral source rule, the other monies received by the victim must compensate the victim for the loss. In other words, it is beyond question that the victim must be receiving these monies *on account* of the injury. *See generally Smith v. United States*, 587 F.2d 1013, 1015 (3d Cir. 1978) (stating that collateral source rule "permits a tort victim to recover more than once for the same injury provided these recoveries come from different sources"); *Perkins v. Runyon Heating & Cooling Servs., Inc.*, 933 S.W.2d 837, 840 (Mo. App. 1996) (finding that collateral source rule did not apply to plaintiff's receipt of worker's compensation benefits for entirely different injury).

Likewise, this Court also plainly envisioned that the compensation would come from sources that are independent of and collateral to the tortfeasor. *See Propeller*, 15 (Howard) at 155 (characterizing injured parties' contract with insurers as "in the nature of a wager between third parties"); *see also Flowers v. Komatsu Mining Sys., Inc.*, 165 F.3d 554, 558 (7th Cir. 1999) (stating that "if the employer is the source of the funds at issue, then the payments can be deducted from the award"); *Titchnell v. United States*, 681 F.2d 165, 175 (3d Cir. 1982) (collateral source rule in Pennsylvania allows plaintiff to recover medical expenses from tortfeasor even though paid by third party, "if such

reimbursement is from a 'collateral source' and not from the tortfeasor").

The Third Circuit has also described the collateral source rule "as 'the judicial refusal to credit to the benefit of the wrongdoer money or services received in reparation of the injury caused which emanate from sources other than the wrongdoer' . . . . However, where the defendant has been the source of the payment, the damages, generally, cannot include the benefit conferred by the defendant." *Feeley v. United States*, 337 F.2d 924, 926-927 (3d Cir. 1964).

The Third Circuit strayed from the intent of the rule as set forth in this Court's decisions and from its own articulation in *Feeley* when, in the instant case, it misapplied the collateral source rule to a company-funded, regular retirement pension. Specifically, the company pension received by Mr. Newhard is *not* from a collateral source; it is entirely funded by and comes directly from PBNE. There is no source independent of the alleged tortfeasor, PBNE. Yet the Third Circuit, without discussion of the purposes and requirements of the collateral source rule, agreed that the District Court was correct in barring evidence of Mr. Newhard's company pension.

In doing so, the Third Circuit's ruling conflicts with the application of the collateral source rule by other courts of appeals in varying contexts.[6] For example, in

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[6] Indeed, lower courts in the Third Circuit have made this distinction. *See, e.g., Mason v. Association for Indep. Growth*, 817 F. Supp. 550, 557 (E.D. Pa. 1993) (distinguishing Third Circuit precedent disallowing setoff for unemployment compensation

E.E.O.C. v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980), the Tenth Circuit found that the plaintiff's damages should be offset by the severance pay received by the plaintiff because the payment of that money was made wholly by the plaintiff's employer and was therefore not collateral. Similarly, in *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 679 (5th Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970), a case brought pursuant to the Jones Act, the Fifth Circuit stated that "[b]ecause the payments were made by the employer and not a third party, we are not faced with the usual problems of the collateral source doctrine."

Additionally, Mr. Newhard's receipt of a company-funded, regular retirement pension does not bear the relationship to his injury that is required for treatment as a collateral source. Mr. Newhard would have received this pension upon his retirement even if he had never suffered an on-the-job injury. More importantly, Mr. Newhard testified that had he not suffered the injury, he would have continued to work at PBNE. Under those circumstances, Mr. Newhard would not have been entitled to receive both a company pension and his regular wages from PBNE. Thus, the second requirement of the collateral source rule is also not met.

Merely because the instant case arises in the context of the FELA does not justify the misapplication of well-established rules of law. Allowing Mr. Newhard or any

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and social security benefits from workers' compensation benefits because workers' compensation benefits "come directly and entirely from the employer or from insurance premiums paid wholly by the employer").

plaintiff to receive both a regular company pension *and* damages for lost future wages does not serve the purposes of the collateral source rule and, additionally, bestows an undeserved and unjust windfall on the railroad employee.[7] If Mr. Newhard had taken another job that accommodated his alleged disability, even at a lower salary, PBNE would have been entitled to reduce his lost future wages by that amount. *See Bissett v. Burlington Northern R.R.*, 969 F.2d 727, 731 (8th Cir. 1992) (affirming that "in a FELA action . . . proof of the failure to mitigate damages for loss of future earning capacity limits the damages to the difference the plaintiff would have earned in his previous position with the railroad and what he might have earned in another position").

The purpose of any compensation scheme is to place the injured party in the position he would have been had no wrongdoing occurred, not in a better position. *Accord Thomas v. Penn Cent. Co.*, 379 F. Supp. 24, 27 (W.D. Pa. 1974) (Congress intended FELA plaintiff to recover only full compensation for his injuries).[8] Thus, PBNE and other defendants should be entitled to introduce the

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[7] Moreover, if more erroneous rulings such as this continue based upon this precedent, the railroad industry will be unduly and unfairly burdened. The industry already currently bears annual costs of approximately one billion dollars in connection with FELA claims. *Association of American Railroads, Claim and Litigation Report* (Calendar years 1992-1996).

[8] Several courts, being concerned about double recovery in FELA cases, have refused recovery for medical expenses paid to the injured worker under railroad group health plans. *See Fuhrman v. Reading Co.*, 439 F.2d 10, 14 (3d Cir. 1971); *Wagner v. Reading Co.*, 428 F.2d 289, 292 n.7 (3d Cir. 1970).

amount of a plaintiff's company pension to offset any damages award. Surely this Court did not envision a contrary result when it first articulated the collateral source rule.[9]

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[9] Moreover, the District Court and the Third Circuit plainly erred in accepting Mr. Newhard's argument that this Court's decision in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963), controls this issue. *Eichel* dealt solely with disability payments, not a regular company retirement pension that was funded entirely by a plaintiff's employer. In ruling that the railroad could not introduce evidence of the employee's disability payments, this Court stressed that the RRA was "substantially a Social Security Act for employees of common carriers . . . . The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer." *Id.* at 254 (quoting *New York, N.H. & Hartford R.R. v. Leary*, 204 F.2d 461, 468 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953)). Unlike the disability payment in *Eichel*, the company pension in this case is not the result of social legislation. PBNE was not required by federal law to pay a pension to Mr. Newhard. This Court should not allow a jury to award damages to Mr. Newhard based on future earnings that he was not entitled to because he chose to retire. To do so unduly punishes PBNE because in no event would Mr. Newhard ever have been entitled to his wages as a railroad worker *and* a company pension. *Cf. E.E.O.C. v. Wyoming Retirement Sys.*, 771 F.2d 1425, 1431-32 (10th Cir. 1985) (finding reduction of damages award for social security benefits to be proper because plaintiff would not have been eligible for benefits if he had continued working).

II. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISIONS OF THE CIRCUITS IN THEIR INTERPRETATIONS OF *EICHEL V. NEW YORK CENTRAL RAILROAD CO.*

In 1963, this Court first addressed the issue of payments to an injured railroad worker in an FELA case. *See Eichel v. New York Cent. R.R.*, 375 U.S. 253 (1963). In *Eichel*, the former employee was receiving monthly disability pension payments pursuant to the Railroad Retirement Act of 1937. *Id.* at 253. The defendant railroad sought to introduce this evidence so as to discredit the employee's testimony regarding his motivation to return to work and the permanency of his injuries. *Id.* at 254. The trial court prohibited the railroad from introducing that evidence. The court of appeals reversed, finding that such evidence could come before the jury. This Court overturned the court of appeal's decision, effectively affirming the district court's discretionary choice. In doing so, this Court, in dicta, simply acknowledged that the defendant railroad had not contended that it should be allowed to offset the plaintiff's damages by introducing evidence of the plaintiff's receipt of a Railroad Retirement disability pension. *Id.*

Numerous courts of appeals have subsequently taken the above discussion of collateral benefits and the Court's dicta that the defendant railroad did "not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by [the injured party]," *id.*, and have erroneously concluded that *Eichel* stands for the proposition that payments to an injured party should not come into evidence for any purpose. In so holding, these courts perceive

Eichel as requiring that evidence of collateral and non-collateral payments be completely concealed from the jury.

The Ninth Circuit, in *Sheehy v. Southern Pacific Transportation Co.*, 631 F.2d 649, 652 (9th Cir. 1980), has stated that *Eichel* sets forth an absolute bar of any evidence of payments received by the injured party. Likewise, the Third, Fourth, Fifth, Sixth, Eighth and District of Columbia Circuits, in *Fuhrman v. Reading Co.*, 439 F.2d 10, 14 (3d Cir. 1971), *Stillman v. Norfolk & Western Railway*, 811 F.2d 834, 838 (4th Cir. 1987), *Page v. St. Louis Southwestern Railway*, 349 F.2d 820, 821 (5th Cir. 1965), *Wilcox v. Clinchfield Railroad*, 747 F.2d 1059, 1060-61 (6th Cir. 1984), *Vanskike v. ACF Industries*, 665 F.2d 188, 200 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), and *Caughman v. Washington Terminal Co.*, 345 F.2d 434, 435-36 (D.C. Cir. 1965), respectively, have concluded, or at least intimated, that *Eichel* mandates a per se rule of inadmissibility. Similarly, the Tenth Circuit recently reversed a trial court's ruling allowing the admission of evidence of disability payments finding that the discussion in *Eichel* concerning the collateral source rule was not dicta but rather was necessary to this Court's holding. *See Green v. Denver & Rio Grande Western R.R.*, 59 F.3d 1029, 1033 (10th Cir.), *cert. denied*, 516 U.S. 1009 (1995).

In contrast, the First Circuit has held that *Eichel* does not stand for that proposition – it does *not* mandate a per se bar of employer-related payments in FELA cases. *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 841 (1st Cir. 1998); *see also DeMedeiros v. Koehring Co.*, 709 F.2d 734, 741 (1st Cir. 1983) ("Even in *Eichel*, moreover, as Justice Harlan pointed out in his concurrence, the narrower

question was simply whether or not to uphold the district court's discretionary ruling."). Accordingly, the First Circuit allowed the defendant railroad to present evidence of the plaintiff's receipt of disability benefits to show malingering. 136 F.3d at 841.

Similar to the PBNE company pension, the RRA disability pension is largely funded by the employing railroad. Thus, the collateral source rule's application is highly questionable as the source is neither independent of nor collateral to the alleged tortfeasor. Moreover, contrary to the beliefs of many of the circuit courts, this Court did not squarely address the collateral source rule in *Eichel* as there was no briefing by the parties on that issue.

Accordingly, this Court should clarify the scope of the collateral source rule in FELA cases. The lower courts require guidance on the extent to which, and the purposes for which, evidence of payments received by a railroad worker may be presented to the jury.

III. GIVEN THE CURRENT TREND IN BOTH COURTS AND LEGISLATURES TO ELIMINATE OR MODIFY THE COLLATERAL SOURCE RULE, THE RULE'S REACH CERTAINLY SHOULD NOT BE EXPANDED IN FELA CASES

In *Kernan v. American Dredging Co.*, 355 U.S. 426, 431-32 (1958), this Court recognized that the FELA is not static, but rather must be flexible to meet changes in society and in the law. Accordingly, application of common-law rules in FELA cases should also not be stagnant.

In recent years, the collateral source rule has come under much criticism in the courts.[10] Federal courts have restricted application of the collateral source rule in actions under the Federal Tort Claims Act ("FTCA"). *See Hassan v. United States Postal Serv.*, 842 F.2d 260, 263-64 (11th Cir. 1988) (finding injured party, who is unable to work and who has received wage benefits in the form of sick pay or unemployment, is not entitled to recover under FTCA for loss of wages already reimbursed); *United States v. Gaidys*, 194 F.2d 762 (10th Cir. 1952) (same). Similarly, this Court and many of the circuit courts have held that where an injured party has received wage benefits in the form of a disability pension, such benefits must be considered in any damage award under the FTCA. *See Brooks v. United States*, 337 U.S. 49 (1949); *Kubrick v. United States*, 581 F.2d 1092 (3d Cir. 1978), *rev'd on other grounds*, 444 U.S. 111 (1979); *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977); *Hale v. United States*, 416 F.2d 355 (6th Cir. 1969); *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952); *Tessier v. United States*, 164 F. Supp. 779 (D. Mass. 1958), *aff'd*, 269 F.2d 305 (1st Cir. 1959).

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[10] The collateral source rule has also come under fire in the legislatures of numerous states in their drive towards tort reform. "By 1991, nearly all fifty states ha[d] enacted some form of tort reform." Note, *'Common Sense' Legislation: The Birth of Neoclassical Tort Reform*, 109 Harv. L. Rev. 1765, 1766 (1996). Many of the states have eliminated the collateral source rule in product liability cases, actions against the government or a public employer, and medical malpractice cases. *See* Daena A. Goldsmith, *A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J. Air L. & Com. 799, 808 (1988).

Likewise, several state courts have refused to apply the collateral source rule to wage benefits paid by the employer following an employee's injury. Other state courts have held that wage benefits received under governmental programs such as social security, workers' compensation and welfare must be considered in awarding compensation to an injured worker. *See, e.g., Birmingham v. City of Niagara Falls*, 125 N.Y.S.2d 692 (1953); *Palmer v. Waterman S.S. Corp.*, 328 P.2d 169, 171-172 (Wash. 1958), *cert. denied*, 359 U.S. 985 (1959). Still other courts have held that plaintiffs' personal injury awards must be reduced by the amount of future benefits to which they are entitled that are capable of being determined when judgment is entered. *See, e.g., Parker v. Esposito*, 677 A.2d 1159, 1163 (N.J. Super. App. Div.), *cert. denied*, 683 A.2d 1162 (N.J. 1996); *Haberkorn v. Chrysler Corp.*, 533 N.W.2d 373, 384 (Mich. App. 1995), *app. denied*, 557 N.W.2d 310 (Mich. 1996).

Retaining the rigid application of the collateral source rule makes no more sense in FELA litigation than in other general tort litigation. By no means, however, should the collateral source rule be expanded in the FELA context.[11] Yet expansion, as plainly demonstrated

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[11] Under FELA precedent, a finding of liability is often not based on "wrongdoing." *See* Schwartz and Mahshigian, *The Federal Employers' Liability Act, A Bane for Workers, A Bust for Railroads, A Boon for Lawyers*, 23 San Diego L. Rev. 1, 4-6 (1986). Liability may be based on strict liability for violation of the Safety Appliance Acts or Boiler Inspection Acts. Negligence under the FELA requires only evidence of the "slightest" negligence by the railroad. *See Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 508 (1957). In addition, the courts have adopted less

in this instance, is exactly what the courts have done in the FELA context.

This Court should take heed of these cases and the country's current interest in revamping the tort system and instruct the lower courts that rigid application of the collateral source rule is unwarranted. Indeed, the policies of the FELA, combined with the general public interest in a fair and efficient tort compensation system, require elimination and not expansion of the collateral source rule in all tort cases, but at the very least in FELA cases. Only then will a jury's determination of the amount of damages reflect full but not over-compensation of a plaintiff.

IV. THE NATURAL APPLICATION OF THIS COURT'S DECISION IN *NORFOLK & WESTERN RAILWAY V. LIEPELT* REQUIRES THAT RAILROAD RETIREMENT TAXES BE CONSIDERED WHEN CALCULATING A PLAINTIFF'S FUTURE WAGE LOSS

Pursuant to the Railroad Retirement Act of 1974 ("RRA"), 45 U.S.C. § 231 *et seq.*, both employers and employees pay a federal tax which funds a Railroad

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stringent proximate cause and foreseeability requirements in FELA cases than in general common law tort litigation. *See Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 116 (1963). "In effect, the Court has attempted to subject railroads to the same no-fault liability other employers are subject to under state workers' compensation statutes, but has failed to accord the railroads the limited damages that are part of the bargain for no-fault liability in workers' compensation schemes." Schwartz and Mahshigian, *supra*, at 6.

Retirement Account. This tax is mandated by the Internal Revenue Code. *See* 26 U.S.C. §§ 3201, 3221. Similar to social security taxes, the Railroad Retirement tax is withheld by the employer.[12] Under the present statutory scheme, a tax of 12.55% is withheld from a railroad employee's paycheck. *See* 26 U.S.C. §§ 3101(a) & (b), § 3201(b).

It is well-established that an injured plaintiff, suing under the remedial FELA scheme, is entitled to recover compensation for "the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received." *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 493 (1980) (citation and internal quotation marks omitted); *see also Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 489 (1916). Based upon this Court's ruling in *Liepelt*, FELA claimants are entitled to a recovery based on the "realistic measure" of their future income, which, because "[t]he amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government," is to be calculated from "after-tax income, rather than his gross income." 444 U.S. at 493. Accordingly, evidence of such taxes must be presented to prevent "overcompensating the plaintiff." *Id.* at 498 (quoting *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 297 (9th Cir. 1975)).

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[12] This Court has held that deductions under the RRA are, in fact, "[c]ompulsory federal taxes" on income. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 582 (1979). The RRA itself clearly imposes the tax "on the income of each employee." 26 U.S.C. § 3201(b).

By allowing Mr. Newhard to receive unreduced future lost wages, the District Court and the Third Circuit ignored this Court's reasoning in *Liepelt* and permitted Mr. Newhard to recover for Railroad Retirement taxes that he will *never* have to pay. Such a result is directly contrary to that intended by this Court and should be reviewed and clarified for future courts.

CONCLUSION

In the context of FELA cases, the circuit courts are widening the boundaries of the collateral source rule far beyond those intended by this Court. This unwarranted growth is most evident in the Third Circuit's refusal in the instant case to explain why the collateral source rule applies to a company-funded, regular retirement pension which is paid by the alleged tortfeasor to the injured party not on account of the recipient's injuries. Further, because this Court's language in *Eichel* leaves much room for interpretation, numerous conflicting decisions regarding the admissibility of any payments received by plaintiffs will continue to be generated unless this Court definitively resolves the question.

Likewise, this Court should step in when a lower court so clearly departs from the intended application and logical extension of this Court's previous decisions. To allow future plaintiffs to receive compensation not reduced by mandatory taxes is contrary to the reasoning soundly articulated by this Court in *Liepelt* and will result in an undeserved benefit for future plaintiffs.

For the foregoing reasons, PBNE respectfully requests that this Court grant PBNE's Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: May 6, 1999

APPENDIX A

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1527

DAVID NEWHARD

vs.

PHILADELPHIA, BETHLEHEM &
NEW ENGLAND RAILROAD
COMPANY,

Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 96-04411)
District Judge: Honorable Franklin S. VanAntwerpen

ARGUED January 14, 1999

BEFORE: NYGAARD, ALITO and LEWIS, *Circuit Judges.*

(Filed Feb. 9, 1999)

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MEMORANDUM OPINION OF THE COURT

LEWIS, *Circuit Judge.*

Appellant Philadelphia, Bethlehem & New England Railroad Company ("PBNE") appeals the District Court's judgment granting appellee David Newhard $582,992.20 in damages for injuries suffered during the course of his employment at PBNE. For the reasons that follow, we will affirm the judgment of the District Court.

I.

On June 17, 1996, Newhard, a 52 year old railroad conductor, instituted a personal injury action against his employer, PBNE, under the Federal Employers Liability Act (FELA), 45 U.S.C. § 51 et seq. Newhard sought to recover damages for lost wages and fringe benefits, as well as pain and suffering for injuries suffered in a railroad accident caused by PBNE's negligence. On June 2, 1997 the trial commenced; and on June 5, 1997, the jury rendered a verdict in favor of Newhard for $613,676.00. Because the jury found Newhard 5% contributorily negligent, the District Court reduced Newhard's award to $582,992.20 and entered judgment on June 9, 1997.

PBNE now seeks a new trial for alleged errors committed by the District Court in the admission and exclusion of evidence. In particular, PBNE contends that the District Court: (1) abused its discretion by excluding evidence of Newhard's retirement and his work-related disciplinary record, (2) erred in allowing Newhard's counsel to comment on Newhard's ineligibility for workers' compensation benefits, (3) erred in ruling that the collateral source rule precluded evidence of Newhard's pension income and his railroad retirement disability income, and (4) erred by refusing to offset Newhard's damages award with the railroad retirement tax.

We exercise appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291. We review a District Court's Rule 403 determination for abuse of discretion. *United States v. Jemal*, 26 F.3d 1267, 1272 (3d Cir. 1994). Review is plenary to the extent that such a decision is based upon interpretation or application of a legal standard. *West v. Philadelphia Electric Company*, 45 F.3d 744, 752 (3d Cir.

1995). An erroneous decision to admit or exclude evidence will not result in reversal unless the error affected a "substantial right" of the aggrieved party. *Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1293 (3d Cir. 1997).

II.

PBNE contends that the District Court abused its discretion in excluding evidence of Newhard's retirement and his two-year suspension for insubordination. We disagree. After considering the arguments on both sides, the District Court applied the Rule 403 balancing test and concluded that the prejudice from admitting this evidence outweighed its probative value. *See* Appendix at 243-48 (retirement evidence); Appendix at 292-94 (disciplinary evidence). We find this conclusion within the District Court's discretion. Accordingly, we will deny PBNE's request for a new trial on this ground.

Similarly, PBNE is not entitled to a new trial on the ground that Newhard's counsel improperly suggested to the jury that Newhard was ineligible for workers' compensation benefits. Even if the District Court erred in allowing Newhard's counsel to make these statements, which is a question we decline to reach here, we find that the error was harmless.

PBNE further argues that the District Court erred in relying on the collateral source rule to prohibit evidence of Newhard's retirement pension income and his railroad retirement disability income.

In *Eichel v. New York Central Railroad,* 375 U.S. 253 (1963), the Supreme Court established the collateral

source rule. There, the Court considered whether disability payments received by a former railroad employee under the Railroad Retirement Act (RRA) were admissible in FELA suits. The Court held:

> *In our view, the likelihood of misuse by the jury clearly outweighs the value of this evidence.* Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act . . . were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act. *We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34 (1963). It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact.

Eichel, 375 U.S. at 255 (emphasis added). In dicta, the Court also noted that RRA disability income is inadmissible to mitigate damages. *Id.* at 254.

Since *Eichel*, courts consistently have used the collateral source rule to exclude evidence of collateral payments. *See, e.g., Green v. Denver and Rio Grand Western Railway Co.*, 59 F.3d 1029, 1032-33 (10th Cir. 1995) ("*Eichel* compels the conclusion that the collateral source rule

prohibits admission of RRA disability benefits in an FELA case"); *Reed v. Philadelphia, Bethlehem & New England Railroad Co.*, 939 F.2d 128, 134 (3d Cir. 1991) (finding that trial court improperly allowed the defense to argue that the plaintiff was receiving disability payments); *Sheehy v. Southern Pacific Transportation Co.*, 631 F.2d 649, 652 (9th Cir. 1980) ("the discretion normally applicable to admit all relevant evidence of collateral benefits is greatly limited in FELA cases"). We find that *Eichel* and its progeny support the District Court's conclusion that Newhard's pension income and RRA disability income are barred by the collateral source rule. In addition, insofar as the District Court applied the Rule 403 balancing test to exclude this evidence, we find that its decision is supported by the Supreme Court's recognition that collateral source evidence has a "substantial likelihood of prejudicial impact." *See Eichel* 375 U.S. at 255; *see also* Appendix at 248.

PBNE's final contention is that the District Court erroneously failed to offset Newhard's lost wages with his Railroad Retirement Board ("RRB") taxes. As support, PBNE cites *Norfolk & Western Railway Co. v. Leipelt* [sic], 444 U.S. 490 (1979), where the Supreme Court held that evidence of an FELA claimant's income taxes should be reduced from their lost wages calculation so that the damage award is a "realistic measure" of their future income. However, the holding in *Leipelt* [sic] dealt with income taxes, and there is a fundamental difference between income taxes and the RRB tax. Payment of RRB "taxes," unlike income taxes, affects the amount of pension benefits a railroad employee actually receives upon retirement. Moreover, PBNE has not cited, and we have

not found, a single FELA decision holding that RRB taxes should be deducted from gross income in calculating net income. Accordingly, we decline to extend the holding of *Leipelt* [sic].

III.

For the foregoing reasons, the judgment of the District Court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Timothy K. Lewis
Circuit Judge

APPENDIX B

[Filed Jun. 4, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID NEWHARD,	:	CIVIL ACTION
Plaintiff	:	
v.	:	NO. 96-4411
PHILADELPHIA, BETHLEHEM &, NEW ENGLAND RAILROAD COMPANY,	:	
Defendant.	:	

ORDER

AND NOW, this 3rd day of June, after an on-the-record colloquy in which we weighed the danger of prejudice and probative value, and upon consideration of the motions, memoranda, and argument submitted by Plaintiff David Newhard and Defendant Philadelphia, Bethlehem & New England Railroad Company, it is hereby ordered that:

1. Plaintiff's Motion in Limine to preclude defendants from making any mention of Plaintiff's pension, disability benefits, and retirement is GRANTED.

2. Defendant's Motion in Limine to permit Defendant to introduce evidence of Plaintiff's pension income is DENIED.

3. Defendant's Motion in Limine to permit Defendant to introduce evidence of Plaintiff's Railroad Retirement Board disability annuity is DENIED.

4. Defendant's Motion in Limine to preclude Plaintiff from making any mention of Plaintiff's ineligibility for workers' compensation benefits is DENIED.

5. Defendant's Motion in Limine to preclude Plaintiff from introducing any evidence relating to damages for lost fringe benefits is GRANTED BY STIPULATION RECEIVED IN COURT.

BY THE COURT:

/s/ Franklin S. Van Antwerpen
Franklin S. Van Antwerpen
United States District Judge

[Entered 6/4/97]

[Copies by Fax on 6/4/97]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID NEWHARD,	:	96-CV-4411
Plaintiff	:	
	:	
v.	:	
PHILADELPHIA, BETHLEHEM &, NEW ENGLAND RAILROAD, COMPANY,	:	Easton, PA June 4, 1997 9:00 a.m.
Defendant.	:	

TRANSCRIPT OF CIVIL JURY TRIAL
BEFORE THE HONORABLE
FRANKLIN S. VAN ANTWERPEN
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[p. 101] Bunin – Recross

Q And, your estimate was it was approximately taxed at 12 to 13 percent?

A Yes.

Q Okay. And, your conservative estimate is 18 percent. You even considered more in income tax?

A Yes, allowing for other types of taxes and the fact that these do vary.

Q Okay. And, you used 18 percent for all the other figures concerning the past lost wages and the future loss of earning capacity?

A Yes. Again, this was an average.

MR. ZERO: Okay. That's all the questions I have.

RECROSS-EXAMINATION

BY MR. HAGGERTY:

Q Mr. Bunin, in your figures, did you take out the eight percent railroad retirement –

A I'm sorry, I didn't hear what you said.

Q Oh, that's okay.

MR. ZERO: Objection, Your Honor.

Q In –

THE COURT: The objection is sustained.

MR. HAGGERTY: I don't have anything further, Your Honor.

THE COURT: By the way, just one – one quick –

MR. HAGGERTY: Well, actually – I'm sorry, Your Honor, [p. 102] if I could see you at sidebar on that for – on that point?

THE COURT: Very well.

(Sidebar begins)

MR. ZERO: Your Honor, he can't mention railroad retirement. He can't do it. That's the *Eichel* case. He cannot –

MR. HAGGERTY: No, no, no. Your Honor, a railroad employee is taxed eight percent on his salary. He gets eight percent of his tax taken out, which goes to the railroad retirement part. That's an additional eight percent tax that he never gets. He's never going to get that money. He doesn't get it now –

THE COURT: That's not really a tax.

MR. HAGGERTY: Well, what can we call it? It's got to be reduced by eight percent.

THE COURT: It's – so what? It's reduced for a lot of things.

MR. ZERO: Judge, –

MR. HAGGERTY: But he has –

THE COURT: The objection is sustained.

MR. HAGGERTY: But, he has –

(Sidebar ends)

MR. HAGGERTY: No further questions, Your Honor.

THE COURT: Mr. Bunin, let me just ask you something. You – will you just explain very briefly to the jury again the

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID NEWHARD	:	CIVIL ACTION
v.	:	
PHILADELPHIA, BETHLEHEM, AND NEW ENGLAND RAILROAD COMPANY	:	No. 96-4411

CIVIL JUDGMENT

(Filed Jun. 9, 1997)

Before the Honorable Franklin S. Van Antwerpen, J.

AND NOW, this 5th day of June, 1997, in accordance with the Jury's Verdict as announced in open court the Court molds the Jury's Verdict to reflect the five percent negligence attributable to the plaintiff and enters a judgment in the total amount of $582,992.20 in favor of the plaintiff and against the defendant.

IT IS ORDERED that Judgment be and the same is hereby entered in favor of plaintiff, David Newhard, and against the defendant, Philadelphia, Bethlehem, and New England Railroad Company in the amount of $582,992.20.

BY THE COURT

/s/ F. S. VanAntwerpen
F.S. VanANTWERPEN,
U.S. DISTRICT JUDGE

[Entered 6/9/97]

APPENDIX E

EMPLOYERS' LIABILITY ACT

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered entitled to the benefits of this chapter.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in

any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54a. Certain Federal and State regulations deemed statutory authority

A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49, is deemed to be a statute under sections 53 and 54 of this title.

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any

common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

§ 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned

for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID NEWHARD,	:	CIVIL ACTION
Plaintiff	:	
v.	:	
PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY,	:	NO. 96-CV-4411
Defendant.	:	

ORDER

AND NOW, this ___ day of ___, 1997, it is hereby **ORDERED** that Defendant Philadelphia, Bethlehem & New England Railroad's Motion in Limine is **GRANTED**. It is hereby **ORDERED** that Defendant may introduce evidence at trial that plaintiff receives pension income for the purpose of reducing any lost future earnings damages awarded to plaintiff.

BY THE COURT:

Franklin S. Van Antwerpen, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID NEWHARD,	:	CIVIL ACTION
Plaintiff	:	
v.	:	
PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY,	:	NO. 96-CV-4411
Defendant.	:	

DEFENDANT PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY'S MOTION IN LIMINE TO ALLOW DEFENDANT TO INTRODUCE EVIDENCE AT TRIAL THAT PLAINTIFF RECEIVES PENSION INCOME

Defendant Philadelphia, Bethlehem & New England Railroad Company ("PBNE"), hereby moves this Court *in limine* to allow PBNE to introduce evidence at trial that plaintiff receives pension income. PBNE seeks to introduce such evidence for the purpose of reducing any lost future earnings damages awarded to plaintiff. The grounds supporting this Motion are set forth in the accompanying Memorandum of Law.

Respectfully submitted,

Dated: June 2, 1997

/s/ John J. Haggerty

John J. Haggerty
Matthew R. Walker
Dechert Price & Rhoads
4000 Bell Atlantic Tower
1717 Arch Street
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(215) 994-4000

Attorneys for Defendant
Philadelphia, Bethlehem &
New England Railroad Company

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID NEWHARD, Plaintiff v. PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY, Defendant.	:	CIVIL ACTION NO. 96-CV-4411

DEFENDANT PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE TO ALLOW DEFENDANT TO INTRODUCE EVIDENCE AT TRIAL THAT PLAINTIFF RECEIVES PENSION INCOME

INTRODUCTION

Plaintiff is a 54 year-old retired former employee of defendant Philadelphia, Bethlehem & New England Railroad Company ("PBNE") who allegedly injured his back on February 2, 1995, while working as a conductor for PBNE at the Bethlehem Steel Plant in Bethlehem, Pennsylvania. On June 17, 1996, plaintiff instituted this action claiming that PBNE violated the Federal Employer's Liability Act, 45 U.S.C.A. § 51 *et seq.* ("FELA"), by causing plaintiff to be injured due to unsafe and inadequate working conditions. Among other damages, plaintiff seeks recovery for lost future earnings.

In September, 1996, plaintiff began receiving a $729.29 per month company pension. This pension is

funded *entirely by PBNE* based on plaintiff's 30 years of service as a conductor for PBNE. Deposition of David Newhard at pp. 12-13, 96-98 [attached as Exhibit A]. This pension is *not* in any way being paid on account of plaintiff's alleged disability. The payments under this company pension, which plaintiff will receive for the rest of his life, total more than $8,750 per year. *Id.* at p. 99. If the jury is not informed that plaintiff receives this pension income, it may improperly compensate plaintiff twice by awarding him future lost earnings on top of his company pension. To prevent such an injustice, evidence that plaintiff receives more than $8,750 a year in pension income must be admitted.[1]

ARGUMENT

PBNE acknowledges, but challenges in a separate Motion in Limine, that the archaic collateral source rule generally allows a tort victim to recover damages for injury caused by the tortfeasor, regardless of compensation received from independent sources. *Leeper v. United States*, 756 F.2d 300 (3d Cir. 1985). The collateral source rule, however, does *not* apply to the pension income paid to plaintiff because the payments were made by PBNE and were *not* made on account of plaintiff's alleged disability. *See Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966

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[1] In addition, PBNE paid plaintiff a one-time lump sum pension payment of $7,511.55. This payment, like the monthly pension income, reduces any lost future earnings plaintiff claims as damages. Accordingly, evidence of this payment must also be admitted so that the jury can accurately evaluate plaintiff's damages claim.

n.10 (4th Cir. 1985) (stating that payments made by an employer to an employee are not from a collateral source; rather, collateral benefits are those received from a source distinct from the employer). The rationale for the collateral source rule is to prevent a tortfeasor from getting the benefit of payments made to the plaintiff *from a source collateral to the defendant*. *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 83 (3d Cir. 1983). This rationale is not frustrated by permitting PBNE to introduce evidence of the more than $8,750 a year in pension income it has paid and continues to pay to plaintiff. In fact, it is essential that the jury consider this evidence in order to be able to accurately assess plaintiff's future earnings loss claim.

Several federal circuit and district courts have recognized the necessity of offsetting plaintiffs' damages awards by amounts received as pension income to prevent plaintiffs from recovering damages to which they are not entitled and which unfairly penalize defendants. *See, e.g., Rhodes v. Guiberson Oil Tools*, 82 F.3d 615, 620 (5th Cir. 1996) (plaintiff's damages should be reduced by amounts received as pension income because plaintiff was entitled only to be made whole, not "better than whole"); *see also Guthrie v. J.C. Penney, Inc.*, 803 F.2d 202, 209-10 (5th Cir. 1986) (plaintiff's back pay award should be reduced by payments received from the employer's retirement fund because "the collateral source rule does not apply when the collateral source is the defendant.") (quoting *Smith v. Office of Personnel Management*, 778 F.2d 258, 263 (5th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986)); *Fariss*, 769 F.2d at 966 (employer-provided pensions received following termination should be offset from the damages plaintiff claims because a damages award

"should only make the wrongfully discharged employee monetarily whole under his employment contract; it should not provide a windfall.") (quoting *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 490 (4th Cir. 1982)); *Meschino v. International Tel. & Tel. Corp.*, 661 F. Supp. 254, 259 (S.D.N.Y. 1987) (pension benefits should be deducted from plaintiff's damages because plaintiff was receiving a benefit which he would not be receiving had he not been terminated and there was no reason to require defendant to pay plaintiff twice).

CONCLUSION

Plaintiff currently receives, and will continue to receive, pension income for the rest of his life. Since plaintiff now claims as damages the very same wage loss for which he is already being compensated by his company pension, plaintiff stands to gain a double recovery.

To prevent this injustice and to allow the jury to accurately assess plaintiff's future lost earnings damages, if any, PBNE must be permitted to present evidence of plaintiff's pension income.

Respectfully submitted,

Dated: June 2, 1997

/s/ John J. Haggerty

John J. Haggerty
Matthew R. Walker
Dechert Price & Rhoads
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793
(215) 994-4000

Attorneys for Defendant
Philadelphia, Bethlehem &
New England Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that I have this date caused a copy of the foregoing Defendant Philadelphia, Bethlehem & New England Railroad Company's Motion in Limine to Allow Defendant to Introduce Evidence At Trial that Plaintiff Receives Pension Income to be served via hand delivery on the following:

Bruce S. Zero, Esquire
Attorney for Plaintiff

Dated: June 2, 1997

/s/ John J. Haggerty
John J. Haggerty

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID NEWHARD, Plaintiff	:	
v.	:	CIVIL ACTION – LAW
PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD CO.,	:	JURY TRIAL DEMANDED
Defendant	:	96-CIV-4411

ORDER

AND NOW, this ___ day of June, 1997, upon consideration of Plaintiff's Motion in Limine on the issue of pension benefits, retirement and disability benefits, it is hereby Ordered and Decreed:

Defendants are hereby precluded from offering any testimony and/or evidence relative to Plaintiff's pension, retirement and/or disability benefits. And further Defendants and their counsel are specifically instructed to refrain from making any mention, directly or indirectly, in any manner whatsoever, during voir dire, opening, examination of witnesses, objections, arguments or closing stats or in any manner whatsoever regarding Plaintiffs pension, retirement and disability benefits.

BY THE COURT:

/s/ _____J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID NEWHARD, Plaintiff v. PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD CO., Defendant	:	CIVIL ACTION - LAW JURY TRIAL DEMANDED 96-CIV-4411

PLAINTIFF'S MOTION IN LIMINE

The Plaintiff, DAVID NEWHARD, by and through his attorneys, POWELL, POWELL & POWELL, hereby moves this Honorable Court to issue an Order precluding the Defendant from presenting any testimony or making any mention, directly or indirectly, that he is retired, receiving a thirty (30) year pension from the railroad, and is receiving a disability from the railroad retirement board for the reasons set forth in Plaintiff's attached Supporting Brief.

POWELL, POWELL & POWELL

/s/ Bruce s. Zero
Bruce S. Zero, Esquire

ATTORNEY FOR PLAINTIFF
Barristers' Row -
142 Adams Avenue
Scranton, PA 18503

[sic]

It is the Plaintiff's position that such evidence is inadmissable in cases brought pursuant to the Federal Employers Liability Act in that the likelihood of misuse by the jury clearly outweighs the value of such evidence.

II. LEGAL ARGUMENT

The United States Supreme Court that in *Eichel v. New York Central Raildroad Co.* [sic], 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (12963) [sic], the Supreme Court held that in an action under the FELA, evidence of disability pension payments was inadmissible either as bearing on the extent or duration of the injury or to show a motive for not returning to work. The Court stated:

> "In our view, the likelihood of misuse by the jury [of such evidence] clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice that [sic] the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits . . . were considered as evidence of malingering by an employee asserting a claim [sic] the [FELA]". 375 U.S. at 255, 84 S.Ct. at 317.

Courts have consistently interpreted Eichel to preclude admission of evidence of collateral benefits whether the such [sic] evidence is presented during the liability or damages phase of trial. *Sheehy v. Southern Pacific Transportation Co.*, 631 F.2d 649, 651, 652 (1980), citing *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103, 1107 (4th Cir. 1977); *Furhman v. Reading Co.*, 439 F.2d 10,

14 (3d Cir. 1971); *Schroeder v. Pennsylvania Railroad Co.*, 397 F.2d 452, 456-57 (7th Cir. 1968); *Caughman v. Washington Terminal Co.*, 345 F.2d 434, 435-36 (D.C. Cir. 1965).

Futhermore [sic], the *Sheehe* [sic] Court emphatically held that Rule 403 of the Federal [sic] of Evidence does not grant discretion to the trial judge in this area. In Sheehe [sic] Court stated:

> " . . . the discretion normally applicable to admit all relevant evidence of collateral benefits is greatly limited in FELA cases. Rule 403 is designed as a guide for the handling of situations for which no specific rules have been formulated. See Advisory Committee notes Federal Rules of Evidence 403. In Eichel, the Supreme Court balanced the appropriate value of such evidence against any unfair prejudice and determined that in such cases, the value is greatly outwieghed [sic] by possible prejudice." 631 F.2d at 652.

Defendant's attempt to enter into evidence the fact that the Plaintiff is receiving disability benefits and pension benefits in this matter is prejudicial and is being offered to show that the Plaintiff has some motivation for not returning to his work. The pension benefits and disability benefits that the Plaintiff is receiving are clearly collateral benefits and are therefore not admissible under the Federal Employer's Liability Act.

III. CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court issue an Order precluding the

Defendant from presenting any evidence, and/or testimony in any matter whatsoever concerning Plaintiffs retirement, pension, and/or disability benefits.

POWELL, POWELL & POWELL

/s/ Bruce S. Zero
Bruce S. Zero, Esquire

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APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID NEWHARD, Plaintiff v. PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY, Defendant.	:	CIVIL ACTION NO. 96-CV-4411

ORDER

AND NOW, this ___ day of ___, 1997, it is hereby **ORDERED** that Defendant Philadelphia, Bethlehem & New England Railroad's Motion in Limine is **GRANTED**. It is hereby **ORDERED** that Defendant may introduce evidence at trial that plaintiff receives a Railroad Retirement Board disability annuity for the purpose of reducing any lost future earnings awarded to plaintiff.

BY THE COURT:

Franklin S. Van Antwerpen,
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID NEWHARD, Plaintiff	:	CIVIL ACTION
v.	:	NO. 96-CV-4411
PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY, Defendant.	:	

DEFENDANT PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY'S MOTION IN LIMINE TO ALLOW DEFENDANT TO INTRODUCE EVIDENCE AT TRIAL THAT PLAINTIFF RECEIVES A RAILROAD RETIREMENT BOARD DISABILITY ANNUITY

Defendant Philadelphia, Bethlehem & New England Railroad Company ("PBNE"), hereby moves this Court *in limine* to allow PBNE to introduce evidence at trial that plaintiff receives a Railroad Retirement Board disability annuity. PBNE seeks to introduce such evidence for the purpose of reducing any lost future income damages

awarded to plaintiff. The grounds supporting this Motion are set forth in the accompanying Memorandum of Law.

Respectfully submitted,

Dated: June 2, 1997

/s/ John J. Haggerty
John J. Haggerty
Matthew R. Walker
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(215) 994-4000

Attorneys for Defendant
Philadelphia, Bethlehem &
New England Railroad Company

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID NEWHARD, Plaintiff	:	CIVIL ACTION
v.	:	NO. 96-CV-4411
PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY, Defendant.	:	

DEFENDANT PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE TO ALLOW DEFENDANT TO INTRODUCE EVIDENCE AT TRIAL THAT PLAINTIFF RECEIVES A RAILROAD RETIREMENT BOARD DISABILITY ANNUITY

INTRODUCTION

Plaintiff is a 54 year-old retired former employee of defendant Philadelphia, Bethlehem & New England Railroad Company ("PBNE") who allegedly injured his back on February 2, 1995, while working as a conductor for PBNE at the Bethlehem Steel Plant in Bethlehem, Pennsylvania. On June 17, 1996, plaintiff instituted this action claiming that PBNE violated the Federal Employer's Liability Act, 45 U.S.C.A. § 51 *et seq.* ("FELA"), by causing plaintiff to be injured due to unsafe and inadequate working conditions. Among other damages, plaintiff seeks recovery for lost future earnings.

In November, 1996, plaintiff began receiving over $1,700 per month from a Railroad Retirement Board

("RRB") disability annuity. Deposition of David Newhard at pp. 98-99. This annuity is paid out of a fund created almost entirely by PBNE contributions. *Id.* The payments under this annuity, which plaintiff will receive for the rest of his life, total more than $20,000 per year. *Id.* at p. 99. If the jury is not informed that plaintiff receives this income, it may improperly compensate him twice by awarding him future lost earnings on top of his RRB annuity. To prevent such an injustice, evidence that plaintiff receives this income must be admitted.

ARGUMENT

PBNE recognizes that the archaic collateral source rule generally allows a tort victim to recover damages for injury caused by the tortfeasor, regardless of compensation received from independent sources. *Leeper v. United States*, 756 F.2d 300 (3d Cir. 1985). Nevertheless, the rule does not require and should not permit plaintiff to abuse it to dramatically inflate his damages. *See Guthrie v. J.C. Penney, Inc.*, 803 F.2d 202, 209-10 (5th Cir. 1986) (plaintiff's back pay award should be reduced by payments received from the employer's retirement fund on the rationale that "the collateral source rule does not apply when the collateral source is the defendant.") (quoting *Smith v. Office of Personnel Management*, 778 F.2d 258, 263 (5th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986)); *Powers v. United States*, 589 F. Supp. 1084, 1107-09 (D. Conn. 1984) (in Federal Tort Claims Act suits in which the injured party has received or subsequently may receive government benefits, whether they be monetary or in-kind, the guiding principle is that the Government, like any other tortfeasor, does not have to pay twice for the same injury).

To prevent this abuse, and to deter it in the future, PBNE submits that the Court should reexamine and reject the collateral source rule in FELA cases. Recent trends and strong public policy considerations mandate such a ruling.

Congress originally passed the Railroad Retirement Act ("RRA") in 1935, which is currently codified at 45 U.S.C. § 231, *et seq*. One of the purposes of the RRA is to compensate a railroad employee permanently disabled due to an injury on the job for loss of income due to the disability. *See* 45 U.S.C. § 231a(a)(1)(iv)-(v). Similarly, one of the purposes of the FELA is to compensate a railroad worker injured on the job for loss of income where the railroad is at fault or, in limited circumstances, strictly liable.

Fair compensation of plaintiff under the FELA for his alleged injuries requires consideration of the compensation plaintiff has already received or will receive in the future through the RRA. Courts in FELA cases have relied on the archaic collateral source rule to exclude relevant evidence of compensation the injured worker has already received. In recent years, however, application of the collateral source rule in general tort litigation has been criticized, restricted and even abandoned in favor of a more rational approach to compensatory damages. In keeping with that trend, the collateral source rule should be abandoned in FELA cases.

Commentators over the last two decades have generally concluded that the rule should be abolished.[1] In addition, several states have, through legislation, moved to reverse the collateral source rule. For instance, in negligence actions in Florida, "the court shall reduce the amount of [the] award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to him, from all collateral sources." Fla. Stat. Ann. § 768.76 (West 1997). *See also* Ariz. Rev. Stat. Ann. § 12-565 (1997); Ill. Ann. Stat. ch. 735, para. 2-1205 (Smith-Hurd 1996); Mich. Comp. Laws Ann. § 600.6303 (West 1997); Minn. Stat. Ann. § 548.36 (West 1996); N.J. Stat. Ann. § 2A:15-97 (West 1997).

Moreover, state and federal courts have become more critical of the rule.[2] Courts in several states have held the

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[1] *See* Stephen D. Sugarman, *Doing Away with Personal Injury Law* 79, 83, 174 (1989); Peter W. Huber, *Liability – The Legal Revolution and Its Consequences* 193 (1988); McDowell, *The Collateral Source Rule – The American Medical Association and Tort Reform*, 24 Washburn L.J. 205 (1985); Lorentzen and Rankin, *The Collateral Source Issue: Forging a Middle Ground*, FIC Quarterly 3 (Fall 1984); Bell, *Complete Elimination of the Collateral Source Rule – A Partial Answer to Criticism of the Present Injury Reparations System*, 14 N.H. B.J. 20 (1972); Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach*, 58 Ky. L.J. 36 (1969); Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478 (1966); Peckinpaugh, *An Analysis of the Collateral Source Rule*, 32 Ins. Couns. J. 32 (1965); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 Harv. L. Rev. 741 (1964); and Schwartz, *The Collateral Source Rule*, 41 B.U.L. Rev. 348 (1961).

[2] British courts abandoned the collateral source rule in relation to wage benefits received from employers in the early 1950s. *See Receiver for the Metropolitan Police Dist. v. Croyden*

collateral source rule inapplicable to wage benefits paid by the employer following plaintiff's injury.[3] Other courts have held that wage benefits received under governmental programs such as workers' compensation and welfare must be considered in awarding compensation to an injured worker. *See, e.g., Birmingham v. City of Niagara Falls*, 125 N.Y.S.2d 692 (1953); *Palmer v. Waterman S.S. Corp.*, 52 Wash. 2d 604, 328 P.2d 169 (1958), *cert. denied*, 359 U.S. 985 (1959). Still other courts have held that plaintiffs' personal injury awards must be reduced by the amount of future benefits to which they are entitled which are capable of being determined when judgment is entered. *See, e.g., Parker v. Esposito*, 677 A.2d 1159, 1163 (N.J. Super. App. Div.), *certif. denied*, 683 A.2d 1162 (N.J. 1996); *Haberkorn v. Chrysler Corp.*, 533 N.W.2d 373, 384 (Mich. App. 1995), *app. denied*, 557 N.W.2d 310 (Mich. 1996).

Corp., [1957] 2 Q.B. 154 (C.A. 1956); *Payne v. Railway Executive*, [1952] I K.B. 26 (C.A. 1951). In 1963, British courts overruled existing precedent and held that statutory disability benefits to an injured party should be considered in mitigation of the tortfeasor's liability. *Browning v. War Office*, [1963] I Q.B. 750 (C.A. 1962).

[3] *See, e.g., United States v. Gaidys*, 194 F.2d 762 (10th Cir. 1952) (applying Colorado law); *Rankin v. Blue Grass Boys Ranch, Inc.*, 469 S.W.2d 767 (Ky. 1971); *LeBlanc v. Southern Farm Bureau Casualty Ins. Co.*, 104 So. 2d 279 (La. App. 1958); *Moon v. St. Louis Transit Co.*, 247 Mo. 227, 152 S.W. 303 (1912); *Szybura v. City of Elmira*, 284 N.Y.S.2d 190 (1967); *Pittsburgh, C.C. & St. L. Ry. v. Fagan*, 3 Ohio N.P. (n.s.) 30 (Supr. Ct. 1905), *aff'd mem.*, 74 Ohio St. 491, 78 N.E. 1135 (1906); and *Antonelli v. Tumolo*, 390 Pa. 68, 132 A.2d 285 (1957).

Federal courts have also restricted application of the collateral source rule in actions under the Federal Tort Claims Act ("FTCA"). Where an injured party, although unable to work, has received wage benefits in the form of sick pay or unemployment, he is not entitled to recover under the FTCA for loss of wages already reimbursed. *See United States v. Gaidys*, 194 F.2d 762 (10th Cir. 1952); *DePaulis v. United States*, 193 F. Supp. 7 (E.D.N.Y. 1961); *Ricciardi v. United States*, 151 F. Supp. 765 (W.D. Pa. 1957). Similarly, where an injured party has received wage benefits in the form of a disability pension, those benefits must be considered in any damage award under the FTCA. *See Brooks v. United States*, 337 U.S. 49 (1949); *Kubrick v. United States*, 581 F.2d 1092 (3d Cir. 1978), *rev'd on other grounds*, 444 U.S. 111 (1979); *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977); *Hale v. United States*, 416 F.2d 355 (6th Cir. 1969); *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952); *Johnson v. United States*, 271 F. Supp. 205 (W.D. Ark. 1967); *Tessier v. United States*, 164 F. Supp. 779 (D. Mass. 1958), *aff'd*, 269 F.2d 305 (1st Cir. 1959).[4]

Continued application of the collateral source rule makes no more sense in FELA litigation than in other general tort litigation. Under FELA precedent, a finding of liability is often not based on "wrongdoing." *See* Schwartz and Mahshigian, *The Federal Employers' Liability Act, A Bane for Workers, A Bust for Railroads, A Boon for Lawyers*, 23 San Diego L. Rev. 1, 4-6 (1986). Liability may be based on strict liability for violation of the Safety

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[4] The federal courts have also deducted military medical benefits from FTCA awards. *See, e.g., Green v. United States*, 530 F. Supp. 633 (E.D. Wis. 1982), *aff'd*, 709 F.2d 1158 (7th Cir. 1983).

Appliance Acts or Boiler Inspection Acts. Negligence under the FELA requires only evidence of the "slightest" negligence by the railroad. *See Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957). In addition, the courts have adopted less stringent proximate cause and foreseeability requirements in FELA cases than in general common law tort litigation. *See Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108 (1963). "In effect, the Court has attempted to subject railroads to the same no-fault liability other employers are subject to under state workers' compensation statutes, but has failed to accord the railroads the limited damages that are part of the bargain for no-fault liability in workers' compensation schemes." Schwartz and Mahshigian, *The Federal Employers' Liability Act, A Bane for Workers, A Bust for Railroads, A Boon for Lawyers, supra*, at 6. The usual rationale of the collateral source rule that "the defendant deserves to pay" simply does not apply to FELA claims.

The purpose of the FELA is to award the injured party full compensation, no more and no less.

> Congress set forth very clearly that railroad employees should have full payment from their employer for all of the FELA liabilities; the source of the funds by which the railroad might pay such liability is not indicated as being of concern so long as the employee received full compensation for his injuries.

Thomas v. Penn Cent. Co., 379 F. Supp. 24, 27 (W.D. Pa. 1974). *See also Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 493 (1980). Awards under the FELA are not for the purpose of punishing the railroad. *See Kozar v. Chesapeake & Ohio Ry.*,

449 F.2d 1238, 1240-43 (6th Cir. 1971) (punitive damages may not be awarded in FELA cases).

Courts have become concerned about double recovery in FELA cases. Courts have refused recovery for medical expenses paid to the injured worker under railroad group health plans. *See Fuhrman v. Reading Co.*, 439 F.2d 10, 14 (3d Cir. 1971); *Wagner v. Reading Co.*, 428 F.2d 289, 292 n.7 (3d Cir. 1970); *Nelson v. Penn Cent. R.R.*, 415 F. Supp. 225 (N.D. Ohio 1976); *Thomas v. Penn Cent. Co.*, 379 F. Supp. 24 (W.D. Pa. 1974); *Rogers v. Chicago N.W. Transp. Co.*, 375 N.E.2d 952 (Ill. App. 1978). In 1980, the United States Supreme Court held that an injured party may only recover net, as opposed to gross, wage loss in FELA cases. *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 493 (1980).

In *Liepelt*, the Supreme Court willingly overruled existing precedent to further the goal of providing compensatory damages based on rational economic analysis. The decision focused on the fact that the earlier rulings reflected a time when federal taxes were relatively insignificant. The Court found that changes in the nature of the federal taxes and their increasing impact on FELA damage awards warranted overruling the "prevailing practice" in order to carry out the purposes of compensatory damages under the FELA. *Id.* at 491-93.

These recent cases should be followed to their logical conclusion. The policies of the FELA and the general public interest in a fair and efficient tort compensation system require elimination of the collateral source rule in all FELA cases. Such a ruling would permit PBNE to present evidence of the over $20,000 in income plaintiff receives annually from his RRB annuity and ensure that

the determination of the amount of damages necessary to fully compensate the plaintiff in this case is based on all the evidence.[5]

CONCLUSION

For the foregoing reasons, PBNE requests that the Court grant its motion *in limine* and order that PBNE may introduce evidence at trial that plaintiff receives over

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[5] Even if the Court excludes evidence that plaintiff receives, and will continue to receive until age 65, over $20,000 annually in income from a RRB disability annuity, it is essential that the Court admit evidence of annuity payments plaintiff will receive after he reaches age 65. When plaintiff reaches age 65, his disability status will be lifted and his RRB disability annuity will be automatically converted into a standard retirement annuity paid *on account of his service as a conductor* at PBNE and *not* on account of injuries allegedly sustained in a work-related accident.

Once the RRB disability annuity is converted into a retirement annuity, there is no rational justification to exclude evidence of these payments. Since these RRB annuity payments are just like non-RRB pension payments, PBNE should be permitted to introduce evidence of these payments for the purpose of reducing any lost future income damages plaintiff claims. The Fourth and Fifth Circuits and the Southern District of New York have already acknowledged the necessity of admitting such evidence to prevent plaintiffs from gaining a windfall double recovery. *See e.g., Rhodes v. Guiberson Oil Tools*, 82 F.3d 615, 620 (5th Cir. 1996); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985); *Meschino v. International Tel. & Tel. Corp.*, 661 F. Supp. 254, 259 (S.D.N.Y. 1987).

$20,000 annually from a Railroad Retirement Board disability annuity.

Respectfully submitted,

Dated: June 2, 1997

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CERTIFICATE OF SERVICE

I hereby certify that I have this date caused a copy of the foregoing Defendant Philadelphia, Bethlehem & New England Railroad Company's Motion in Limine to Allow Defendant to Introduce Evidence At Trial that Plaintiff Receives a Railroad Retirement Board Disability Annuity to be served via hand delivery on the following:

Bruce S. Zero, Esquire
Attorney for Plaintiff

Dated: June 2, 1997

/s/ John J. Haggerty
John J. Haggerty

(2)

Supreme Court, U.S.
FILED
JUN 4 1999
CLERK

No. 98-1800

IN THE
Supreme Court of the United States

PHILADELPHIA, BETHLEHEM AND
NEW ENGLAND RAILROAD COMPANY,

Petitioner,

v.

DAVID NEWHARD,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District Court abused its discretion by applying the Federal Rule of Evidence 403 balancing test and this Court's ruling in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963), in precluding introduction of plaintiff's pension benefits and Railroad Retirement Act disability benefits?

2. Whether this Court's decision in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) supports the District Court's discretionary ruling that evidence of plaintiff's receipt of pension benefits and disability benefits have a substantial likelihood of prejudicial impact?

3. Whether this Court's decision in *Norfolk & Western Railway Co. v. Leipelt*, 444 U.S. 490 (1979) should be extended to offset plaintiff's lost wages by Railroad Retirement Board taxes?

4. Whether this matter is now moot due to the parties settlement agreement and payment by PB&NE to plaintiff in the amount of the Judgment plus interest and costs?

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OPINIONS BELOW

The Opinion of the Third Circuit Court of Appeals affirmed rulings made by the District Court in excluding evidence of David Newhard's receipt of pension benefits and Railroad Retirement Act disability benefits. The Court of Appeals held that *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) and its progeny supported the District Court's conclusion that pension benefits and Railroad Retirement Act disability benefits are barred by the collateral source rule. In addition, the Court of Appeals found that since the District Court applied the Rule 403 balancing test to exclude plaintiff's receipt of pension and disability benefits, the lower court's decision is supported by this Honorable Court's decision in *Eichel*. Furthermore, the Court of Appeals properly held that this Court's decision in *Norfolk & Western Railway Co. v. Leipelt*, 444 U.S. 490 (1980) should not be extended to include a deduction for Railroad Retirement Board taxes to offset wages. *See* Opinion of the Honorable Judge Lewis of the Third Circuit Court of Appeals, attached as Appendix "A", to Petitioners' Writ of Certiorari.

STATEMENT OF THE CASE

On June 17, 1996, Respondent, David Newhard (hereinafter "Newhard"), brought this action against his employer, Petitioner, Philadelphia, Bethlehem & New England Railroad (hereinafter "PB&NE"), for relief under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (FELA). Newhard sought to recover damages for severe injuries suffered in the course of his railroad employment with PB&NE. Newhard was employed by PB&NE as a conductor. On February 2, 1995, Newhard was

thrown from his train and seriously injured when the train he was riding on was forced to make a sudden stop to avoid a collision with another train which employees of PB&NE had sent moving toward Newhard's train on the same track.

Prior to trial, the District Court was presented with several Motions in Limine. Relevant to the instant Writ of Certiorari was PB&NE's Motion for permission to introduce evidence that Newhard received pension benefits. The District Court denied this Motion. Another Motion made by PB&NE was to allow the Railroad to introduce evidence that plaintiff receives a Railroad Retirement Board Disability Annuity. This Motion likewise was denied. Newhard also filed a Motion to Preclude PB&NE from offering into evidence any information with regard to Newhard's disability benefits under the Railroad Retirement Act, pension benefits which he received through a collective bargaining agreement with his Union and Newhard's retirement. Plaintiff's Motion was granted by the Trial Judge, who relied upon *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963), and its progeny which precludes evidence of collateral benefits whether such evidence is presented during the liability or damage phase of an FELA trial. Furthermore, the District Court excluded the aforementioned evidence of pension benefits and Railroad Retirement Act disability benefits, specifically indicating that the admission of such evidence was more prejudicial than probative, pursuant to Federal Rule of Evidence 403[1] (J.A. 76, 79-81) (App. 2a, *infra*).

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1. Respondent cites to the Joint Appendix ("J.A.") that was before the Third Circuit as allowed by Supreme Court Rule 12.7 to support the factual statements made herein.

The case was tried before The Honorable Franklin S. VanAntwerpin in the United States District Court for the Eastern District of Pennsylvania, commencing on June 2, 1997. Plaintiff presented numerous witnesses on his behalf, including but not limited to, medical expert testimony, vocational rehabilitation expert testimony and an actuary and economic consultant. On re-cross examination of Newhard's expert economist, PB&NE's counsel attempted to question said expert on the effects of the Railroad Retirement tax. This area of questioning was properly excluded by the District Court. The actuary hired by Newhard, whose testimony was not refuted by an expert for the AB&NE, took into account, the effect of income taxes on Newhard's past and future lost wages as required by this Court's ruling in *Norfolk & Western Railway Co. v. Leipelt*, 444 U.S. 490 (1979) (J.A. 400-404, 422-424).

On June 5, 1997, the Jury returned a verdict in favor of Newhard in the amount of Six Hundred Thirteen Thousand Six Hundred Seventy-Six ($613,676) Dollars. The court thereafter molded the verdict due to the fact that Jury found Newhard five (5%) percent comparatively negligent and entered Judgment on the verdict in the amount of Five Hundred Eighty-Two Thousand Nine Hundred Ninety-Two Dollars and twenty cents ($582,992.20). After trial, the District Court denied PB&NE's Motion for a New Trial on several grounds that were not included in PB&NE's appeal to the Third Circuit or the Petition for Writ of Certiorari.

The Third Circuit Court of Appeals affirmed the decision of the District Court on February 9, 1999. The Third Circuit found that *Eichel*, and its progeny prohibits the admission of Railroad Retirement Act (RRA) Disability Benefits and the court held that insofar as the District Court

applied the Rule 403 balancing test to exclude pension benefits and Railroad Retirement Act disability benefits, this ruling is supported by this court's recognition that collateral source has a "substantial likelihood of prejudicial impact". *Eichel*, 375 U.S. at 255. Since there was not an abuse of discretion or misapplication of the law, the Court of Appeals refused to disturb the District Court's discretionary ruling in excluding Newhard's pension benefits and RRA disability benefits. It should be noted that at no time did counsel for PB&NE offer factual evidence or submit the terms of Newhard's retirement pension plan to the District Court below.[2] Further, there was no testimony concerning the terms of the Collective Bargaining Agreement, since it was not a plan designed for a set off for damages in an FELA case.

PB&NE also argued to the District Court that it should have been allowed, on re-cross-examination of Newhard's actuary to raise the question of the effects of Railroad Retirement tax (which, in effect, is the Railroader's Social Security Tax) on plaintiff's past and future wage loss calculation (J.A. 423-424). The Third Circuit rejected this argument stating that the Railroad Retirement Board (RRB) (taxes), unlike income taxes, affects the amount of pension benefits a Railroad employee actually receives upon retirement. The Third Circuit declined to extend this Court's decision in *Leipelt*, 444 U.S. 490 (1979).

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2. PB&NE on page 2, 3, and 5 of its Petition for Writ of Certiorari attempts to outline the terms of the pension under Newhard's Collective Bargaining Agreement. It should be pointed out that the Collective Bargaining Agreement itself setting forth the pension plan, or any factual testimony regarding same was never submitted into evidence at the time of trial. Therefore, such statements of counsel have no factual support.

The Third Circuit affirmed that the District Court had not abused its discretion by excluding Newhard's retirement and receipt of a retirement pension. The Court of Appeals upheld this Court's ruling in *Eichel*, and refused to disturb the District Court's ruling insofar as the District Court did the balancing test required under Federal Rule of Evidence 403. Furthermore, the Third Circuit concluded that the payment of income taxes and the payment of the Railroad Retirement tax differ fundamentally and declined to extend this Court's holding in *Leipelt*.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT PROPERLY EXCLUDED EVIDENCE OF NEWHARD'S RETIREMENT PENSION AND DISABILITY PENSION FROM THE RAILROAD RETIREMENT BOARD.

This Honorable Court should deny review of this matter since the District Court and Circuit Court properly precluded evidence of Newhard's disability pension and retirement pension under longstanding federal case law on the issue on the inadmissibility of collateral benefits. Furthermore, the Circuit Court refused to disturb the District Court's discretionary ruling under Federal Rule of Evidence 403. This Court's opinion in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963), held that in an action under the FELA, the evidence of a Disability Pension payment was inadmissible either as bearing on the extent or duration of

the injury, or to show a motivation for not returning to work.[3] The Court held:

> In our view, the likelihood of misuse by the jury [of such evidence] clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes that the receipt of disability benefits . . . were considered as evidence of malingering by an employee asserting a claim under the [FELA]. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34 (1963). It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact.

Eichel, 375 U.S. at 255.

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3. This Court has also precluded admission of collateral sources of benefits in analogous Jones Act cases due to the prejudicial nature of such evidence. *Tipton v. Socony Mobile Oil Co.*, 375 U.S. 34 (1963).

Circuit courts have consistently held that *Eichel* precludes admission of collateral benefits, whether such evidence is presented during the liability or damage phases of the trial. *See, e.g., Green v. Denver and Rio Grande Western Railway Co.*, 59 F.3d 1029, 1032-33 (10th Cir. 1995), *cert. denied*, 516 U.S. 1009 (1995) ("*Eichel* compels the conclusion that the collateral source rule prohibits admission of Railroad Retirement Act disability benefits in an FELA case"); *Reed v. Philadelphia, Bethlehem & New England Railroad Co.*, 939 F.2d 128, 134 (3rd Cir. 1991) (finding that the trial court improperly allowed the defense to argue that the plaintiff was receiving disability payments), *cert den.*, 113 S. Ct. 1584 (1993); *Sheehy v. Southern Pacific Transportation Co.*, 631 F.2d 649, 652 (9th Cir. 1980) ("a discretion normally applicable to admit all relevant evidence of collateral benefits is greatly limited in FELA cases"). *Page v. St. Louis Southwestern Railroad Co.*, 349 F.2d 820 (5th Cir. 1965) (precluding the admission of evidence of a railroad pension to show that an elderly employee would have retired even absent the injury); *Haughton v. Blackships, Inc.*, 452 F.2d 788 (5th Cir. 1972) (declining consideration of a seaman's maritime pension in mitigation of damages on the theory that the pension was a benefit directly attributable to the employer under the collateral source rule when all the monies in the retirement fund was contributed by the employer). The court in *Haughton* found that the contract was in the nature of a fringe benefit or deferred compensation and, thus, was not established by the employer for the purposes of indemnifying itself against liability. The court in *Haughton*, concluded that the source of the funds may be determined to be collateral or independent even though the employer tortfeasor supplies such funds. 452 F.2d at 790.

The PB&NE also erroneously suggests that there is disagreement between the Circuits which needs to be resolved by this Court. In support of their position, PB&NE cites *McGrath v. Consolidated Rail Corporation*, 136 F.3d 838 (1st Cir. 1998) (indicating that *Eichel* does not mandate a *per se* bar of employer related payments in FELA cases). The court in *McGrath* applied the 403 balancing test considering evidence of such benefits. The District Court in the instant matter applied the same Rule 403 balancing test and concluded that such evidence of Newhard's receipt of pension benefits and disability benefits were more prejudicial than probative and therefore should not be admitted at the time of trial (App. 2a, *infra*). This discretionary ruling by the District Court should not be disturbed absent an abuse of discretion since the decision is clearly in accordance with this Honorable Court's opinion in *Eichel*. This Court in *Eichel* conclusively determined that Railroad Retirement Act disability payments to an injured employee cannot be used to off-set the employer's FELA liability. *Eichel*, 375 U.S. at 254, 255.

As this Honorable Court stated in *Eichel*, the Railroad "does not dispute that it would be highly improper for the disability payments to be consideration in mitigation of damage suffered by" the injured employee. 375 U.S. at 254. In the instant case, counsel for PB&NE, with regard to his attempt to admit Newhard's receipt of Railroad Retirement Act disability benefits, stated that he was not using the receipt of disability benefits and pension benefits to show malingering in this case (J.A. 73). However, the Jury may have used evidence of pension benefits improperly and made a finding of no liability on the Railroad due to the fact that Newhard was already receiving some form of compensation.

In *Tipton v. Socony Mobile Oil Co. Inc.*, 375 U.S. 34 (1963), this Court did not limit the application of the collateral source rule to the damage phase of the trial noting that the Jury in that case was led to place undue emphasis on the availability of compensation benefits in determining a liability issue (whether Plaintiff was a seaman within the Jones Act) 375 U.S. at 38. Therefore, *Eichel* and *Tipton* preclude admission of collateral benefits, whether presented during the liability or damage phase of a trial.

This Honorable Court has recently denied Certiorari on the same identical issue that Petitioner raises here. In *Green v. Denver and Rio Grande Western Railway Co.*, 59 F.3d 1029 (10th Cir. 1995), *cert. den.*, 516 U.S. 1009 (1995). The Circuit Court in *Green* asserted that *Eichel* decided the issue against off-set of damages. The court in *Green* followed *Eichel* and stated:

> As plaintiff asserts *Eichel* compels the conclusion that the collateral source rule prohibits admission of RRA disability benefits in an FELA case. The narrow issue in *Eichel* was whether evidence of RRA disability payments was admissible to show malingering by the plaintiff. The Supreme Court stated that "the likelihood of misuse by the jury clearly outweighs the value of this evidence" and noted that it had collateral benefits is readily subject to misuse by the jury.

Id. at 255 (citing *Tipton v. Socony Mobil Oil Corp.*, 375 U.S. 34 (1963)).

The Tenth Circuit in *Green* was also persuaded by the decisions of several other Circuits which determined that admission of collateral source payments was not harmless. *Phillips v. Western Co. of N. America*, 953 F.2d (5th Cir. 1992). *Reed v. Philadelphia, Bethlehem & New England Railroad Co.*, 939 F.2d 128, 134 (3rd Cir. 1991), *cert. den.*, 113 S. Ct. 1584 (1993).

Similar to *Green* case, the Third Circuit Court of Appeals in the instant matter concluded that *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963) and its progeny support the District Court's conclusion that Newhard's pension and Railroad Retirement Act disability pension are barred by the collateral source rule. Furthermore, the Third Circuit in the instant case also held that insofar as the District Court applied the Rule 403 balancing test to exclude this evidence, "we find that its decision is supported by the Supreme Court's recognition that collateral source evidence has a 'substantial likelihood of prejudicial impact.' " *See* Opinion of Circuit Judge Lewis, page 5 and 6, attached as Appendix "A" to Petitioner's Writ of Certiorari.

Even the case cited by PB&NE in support of its position, *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998). The defendant railroad did not even ask the court to rule that Railroad Retirement Act disability benefits could be used to reduce the defendant's liability under the FELA. The court in *Green*, 59 F.3d at 1029, in reaching the result it did, did more than just rely on *Eichel*; it also analyzed cases involving similar sources of compensation, and concluded that the law is clear and such sources cannot be used by the PB&NE to reduce their liability. Furthermore, Petitioner improperly relies on *EEOC v. Wyoming Retirement Systems*, 771 F.2d 1425 (10th Cir. 1985), which

is an age discrimination case where there was no danger of prejudicing a jury with such evidence of benefits received. *Eichel* and its decisional progeny, clearly exclude evidence of Newhard's receipt of collateral benefits, such as his railroad pension and disability pension.

II.

NEWHARD'S COMPANY PENSION WAS PROPERLY EXCLUDED BY THE DISTRICT COURT UNDER THE COLLATERAL SOURCE RULE AND FEDERAL RULE OF EVIDENCE 403.

The Petitioner also argues that since PB&NE was the sole source of the pension benefits, that same are not collateral. This argument is completely without merit under the Federal Employers' Liability Act. In cases analyzing this subject, the courts have consistently ruled that the collateral source rule applies even when the employer is the sole source of the fund. The important consideration is the character of the benefits received rather than when the source is actually independent of the employer. *Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984); *Haughton v. Blackships, Inc.*, 452 F.2d 788 (5th Cir. 1972); *see also United States v. Price*, 288 F.2d 488 (4th Cir. 1961). Therefore, the mere fact that the employer was the sole source of the fund, does not mean that it is not a collateral source subject to exclusion under the longstanding collateral source rule in FELA cases.[4]

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4. PB&NE did not attempt to enter into evidence the Collective Bargaining Agreement it negotiated between itself and the Union representing Newhard. It is submitted that said Collective Bargaining Agreement did not provide for an off-set of PB&NE's (Cont'd)

In *Clark*, 726 F.2d at 448, the agreement in that case was submitted into evidence by defendant's counsel which allowed the Trial Judge to make a correct ruling. The policy in question in *Clark* contained a clause allowing a set-off from any settlement or other payment on account of plaintiff's injuries. 726 F.2d at 449. PB&NE did not submit the Collective Bargaining Agreement in the instant matter since no language permitting a set-off is contained therein. In order to have a set-off from an FELA damage award, PB&NE's contract with the employee has to have a specific provision permitting said set-off similar to the one in *Clark*. As stated in *Clark*, the benefit in question must be meant to indemnify the employer against possible liabilities under the FELA. 726 F.2d at 450. 45 U.S.C. § 55 specifically prohibits any contract, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created under the FELA. Since the Collective Bargaining Agreement setting forth the pension benefits in the instant matter nor any other agreement concerning Newhard's receipt of pension benefits was not entered in the record in this case, no set-off can be permitted.

Similarly, in *Haughton v. Blackships, Inc.*, 452 F.2d 788 (5th Cir. 1972), a boat swain brought an action for personal injuries and a question arose in computing damages payable to a seaman whether it was improper to consider the seaman's maritime pension in mitigation of damages on the theory that the pension was a benefit directly

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(Cont'd)
FELA liability by pension payments made to Respondent. PB&NE cannot unilaterally alter its contract with the Union to provide a provision not negotiated on or agreed to. The Railway Labor Act, 45 U.S.C. §§ 152, 156 establishes the exclusive method for altering an existing contract.

attributable to the employer under the collateral source rule where all of the money in the retirement fund was contributed by the employer. The fund was established by virtue of a contract between the employer and the Union. (The exact same type of retirement plan in the instant matter). The court found that the contract was in the nature of a fringe benefit or deferred compensation and, thus, was not established by the employer for the purposes of indemnifying itself against liability. The Fifth Circuit in *Haughton*, concluded that the source of the funds may be determined to be collateral or independent even though the employer tortfeasor supplies such funds. 452 F.2d at 790. The reasoning in *Haughton* was also followed in the case of *Russo v. Matson*, 486 F.2d 1018 (9th Cir. 1973), where evidence of pension benefits received by an employee were excluded by application of the collateral source rule citing *Haughton*, 452 F.2d at 788, and *Hall v. Minnesota Transfer Co.*, 322 F. Supp. 92 (D. Minn. 1971).

The PB&NE also fails to point out to this Court that Newhard's acceptance of the company pension was his right irrespective of his injury. In attempting to cross-examine the Newhard, the record revealed that Newhard was entitled to his pension as a result of his employment with the PB&NE for thirty (30) years. (J.A. 245-247). It was then, a benefit that he has already earned through years of service to the PB&NE, as opposed to a future right to continued employment.[5] PB&NE never submitted the company's pension plan to the court as a part of the record and cannot now, submit, in argument, the terms of the plan. In *Ward v.*

5. PB&NE now seeks to diminish the compensation for injuries Mr. Newhard suffered as a direct result of their negligence because of benefits Mr. Newhard earned through thirty years of service to the railroad.

Union Barge, 443 F.2d 565 (3rd Cir. 1971), defendant, in a case involving maintenance and cure to a seaman, attempted to argue that it was entitled to a credit based upon a Collective Bargaining Agreement. The court held that, since the contract had never been put into the record, it was presumed that it was not entitled to a credit. *Id.* at 572. Here, PB&NE makes many arguments about the contents and terms of the agreement in question without having submitted it into the record. This attempt, of course, is improper.[6] Moreover, counsel for PB&NE admitted to the court that Newhard was entitled to this benefit under any circumstances (J.A. 244). Thus, the pension benefit was a vested right at the time of his injury, and not a future contingency.

There is another reason for ignoring the pension benefits in calculating damages under the FELA. In determining whether payments under an employee benefit plan should reduce the PB&NE's liability, courts have focused on whether the plan expressly provides for such reduction. If it does not, courts are uniform in rejecting the use of pension payments to reduce an employer's liability. Perhaps no better expression of this rule is found than in *Davis v. Odeco, Inc.*, 18 F.3d 1237, 1244 (5th Cir.), *cert. den. sub nom., Murphy Exploration and Products Co. v. Davis*, 513 U.S. 819 (1994):

> Generally speaking, when an employee has bargained for a fringe benefit as additional consideration for employment, compensation received by the employee under that fringe

6. The record in this matter is flawed due to the fact the collective bargaining agreement in question was never introduced as evidence in the District Court.

> benefit should not be deducted from damages awarded to the employee as a result of the employer's negligence. As the employee is already contractually entitled to that benefit, allowing the employer to deduct such compensation would both compensate the employee and provide the employer with an undeserved windfall. Thus in evaluating whether a benefit derives from a collateral source, we ordinarily assess that whether that benefit is in the nature of a fringe benefit (or deferred compensation) or instead reflects a tortfeasor's effort to anticipate potential liability.

The pension fund from which Newhard received payment certainly was not established with the tort liability of the Railroad in mind. It came about as the result of negotiations with the Union, and entitlement to its benefits in no way depends upon Railroad tort liability, whether the FELA or otherwise. Employees are entitled to the retirement benefits so long as the contractual requirements relating to age and time of service are met. Thus, that Newhard may have been motivated by his injury to retire, when he did is irrelevant. The key to the role that retirement payments should play in an FELA action depend rather on the purpose of the pension contract and not why employees choose to retire. In all of the cases which set off of fringe benefits were permitted, general non-set off rule was recognized, but the courts found that the employer-employee agreement expressly permitted set off. *See, e.g., Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984).

Thus, the assertion by PB&NE that the pension in this case is not a collateral source because "it is entirely funded

by and comes directly from" and that there "is no source independent of" PBN&E is misleading in two respects. First, it shows a misunderstanding of the reality of employment contracts. In a real sense, just like "there is no such thing as a free lunch", there is also "no such thing as a free fringe benefit". The fact that the employer makes payments to the fund as an initial matter does not mean that the employer is really the source of those payments. In reality, the payments are funded by the employee's labor, and are non-wage form of compensation.

III.

THIS COURT'S DECISION IN *NORTHFOLK AND WESTERN RAILWAY v. LIEPELT*, DOES NOT REQUIRE THAT RAILROAD RETIREMENT TAXES HE CONSIDERED WHEN CALCULATING PLAINTIFF'S WAGE LOSS.

Petitioner asserts incorrectly in its Brief, that it should have been allowed to illicit testimony from Newhard's expert actuary concerning payment of Railroad Retirement Tax. The Petitioner entirely misinterprets this Court's analysis in *Norfolk & Western Railway Co. v. Leipelt*, 444 U.S. 490 (1979). There, this Court merely held that evidence of income taxes might be relevant and for the jury to consider in making its award, along with an instruction concerning the fact that there will be no taxes on the award. In doing so, however, the court also noted that the introduction of such evidence must not, necessarily, be admitted in every case. *Leipelt*, 444 U.S. at 494. Moreover, Newhard offered evidence through his vocational expert that he was essentially disabled from all lines of employment, rail and otherwise, thus the relevance of the taxes further attenuated.

PB&NE did not present an economist or actuary to substantiate or dispute Newhard's wages, gross or net. The testimony was presented by Newhard's expert, who testified concerning the impact of taxes upon Newhard's past and future wage loss. PB&NE at no point, raised an objection to any of the testimony presented by Newhard during direct examination and did not bring the subject of the Railroad Retirement Tax up during cross-examination. It was not until re-cross examination that PB&NE's counsel attempted to cross-examine Newhard's economist on the effect of Railroad Retirement Taxes.[7]

Newhard presented the testimony of an actuary, which followed *Leipelt*, where the court noted: "Effective methods of presenting the essential elements of any expert calculation in a form that is understandable by juries . . ." 444 U.S. at 494. In the instant matter, the economist presented a calculation to the jury in the traditional manner, accounting for wage increases, taxes, discount rate and present value.

The PB&NE argues that in calculating employee's wages, the "net loss" should be determined after deduction of Railroad Retirement Board Taxes, citing *Leipelt*. There is a fundamental difference between the nature of income taxes and the nature of Railroad Retirement Board Taxes. Income taxes paid by an individual are 100% diluted in their impact on the individual, *i.e.*, no individual can trace any benefit to himself as a result of his payment of taxes. Railroad Retirement Board taxes, however, are different in that earnings and resulting taxes paid to the Railroad Retirement Board directly impact eligibility for benefits. When a railroad employee cannot keep paying Railroad

7. The District Court properly refused to allow PB&NE to re-cross examine the economist on Railroad Retirement Taxes.

Retirement Board taxes, he is impairing his eligibility for Railroad Retirement Board disability benefits. When an injured person cannot pay income taxes, other taxes are being paid, which help run the government. Thus, if the court is to deduct Railroad Retirement Board Taxes, it also opens the door to require a showing of the resulting loss to Newhard, leading to a likelihood of totally confusing the jury. This Court in *Leipelt* never intended for the deduction of social insurance taxes to be used in computing plaintiff's lost wages, past or future.

The Supreme Court of Virginia in *Norfolk & Western Railway Co. v. James L. Chittum*, 251 Va. 408, 468 S.E.2d 877 (1996), was confronted with the same identical issue presented here. The railroad in *Chittum*, argued that for the purpose of calculating Chittum's net wages under the [FELA], Tier 1 and Tier 2 retirement payments made by Chittum should be deducted from his gross wages. Again, the railroad relied on *Liepelt*, a wrongful death action brought under the FELA, where the Supreme Court held that with respect to the measure of damages, a railway company is entitled to present evidence of the effective income taxes on the decedent's estimated future earnings. 444 U.S. at 493-94. The court in *Chittum* stated:

> The Supreme Court, however, has never held that Tier 1 and Tier 2 payments toward retirement are to be treated the same as federal and state income taxes and, therefore, deducted to establish net income. Nevertheless, building upon *Liepelt*, N & W asserts that the retirement payments are congressionally mandated federal taxes and, therefore, like income taxes, should be deducted from gross income in determining

> damages. We do not agree. Even though retirement payments are mandated by Congress, we do not equate them with income taxes. Furthermore, N & W has not cited, and we have not found, a single FELA decision from either a federal or a state court holding that retirement payments should be deducted from gross income in calculating net income. We conclude, therefore, that the trial court did not err in rejecting N & W's contention."

251 Va. at 416, 468 S.E.2d at 882.

The Railroad Retirement tax is not a Federal Income Tax, as asserted by the railroad. The PB&NE cites no case directly supporting its position with regard to this issue. Further, PB&NE's reliance on *Hisquierdo v. Hisquierdo*, 439 U.S. 575 (1979), is entirely misplaced. This Court stated in *Hisquierdo* that compulsory Federal Taxes finance the Railroad Retirement Act Benefits rather than holding that deductions under the Railroad Retirement Act are compulsory federal taxes on income.

Moreover, the Trial Judge properly charged the jury that they should take into consideration NEW HARD's lost wages after taxes (App. 4a, *infra*) and the testimony concerning taxes was presented into evidence by Newhard's Economist, who took into consideration a conservative figure of 18% in reducing plaintiff's lost wages to their net value (J.A. 401-402). This testimony was not countered by any actuary or economist hired by the PB&NE in this case. Newhard presented testimony concerning Newhard's lost wages after taxes and the Trial Judge instructed the jury concerning same and therefore *Liepelt* was strictly followed in this case.

IV.

THIS PETITION FOR WRIT OF CERTIORARI IS MOOT DUE TO THE SETTLEMENT AGREEMENT REACHED BETWEEN NEWHARD AND PB&NE.

The final compelling reason for denying Petitioner's Writ of Certiorari in this matter is due to the fact that the case has already been settled. On February 9, 1999, the Court of Appeals affirmed the Judgment of the District Court in favor of Newhard. The Circuit Court issued its mandate on March 3, 1999. Thereafter, PB&NE filed a Motion to Recall the Mandate and Stay Execution of the Judgment pending disposition of a Petition for Writ of Certiorari to the Supreme Court. After response was filed by the Appellee in opposition to said Motion, the Circuit Court denied PB&NE's Motion to Recall the Mandate and Request for a Stay.

During the pendency of the Railroad's Motion to Stay Execution of the Judgment, counsel for PB&NE requested that counsel for Newhard refrain from executing on the Judgment until the Third Circuit ruled on the Stay Motion. In consideration for not executing on the Judgment, it was agreed between the parties that the matter would be settled for the total amount of Judgment plus interest and costs if PB&NE's Motion for Stay was denied by the Court of Appeals. On April 12, 1999, the parties were served with an Order dated April 9, 1999, wherein PB&NE's Motion for Stay was denied.

On April 15, 1999, PB&NE forwarded to the attention of Newhard's counsel the settlement draft for the amount of Judgment, interest and costs pursuant to the settlement

agreement. Thereafter, counsel for Newhard forwarded to counsel for PB&NE a Stipulation of Dismissal for filing with the District Court due to the settlement agreement reached between the parties. In breach of the above-referenced settlement agreement, PB&NE filed the instant Petition for Writ of Certiorari. Since the Judgment has been satisfied and settlement has been reached between the parties, it is clear that PB&NE's Petition for Writ of Certiorari is now moot.

Since the Judgment has been satisfied by the payment to Newhard in the amount of the Judgment plus interest and costs, it will be impossible for this Honorable Court to grant the relief requested by PB&NE in its Petition for Writ of Certiorari. This matter has been concluded by way of settlement between the parties and this Honorable Court should forthwith deny the instant Writ.

CONCLUSION

The decision by the District Court and the Third Circuit is in accord with *Eichel*, *Tipton* and with the many other Circuit Court decision which have addressed the same issue. There is obviously no conflict with this Court or other Circuit Courts of Appeals and no compelling argument has been presented that *Eichel* should be overruled. In addition, this Court's decision in *Leipelt* was not intended to allow Defendant Railroads to deduct the Railroad Retirement Tax in computing an injured workers' past and future lost wages. Such a result would deprive a railroad worker of a benefit earned over thirty years of employment. The tortfeasor railroad would conversely derive an undeserved windfall by reducing justly deserved compensation the injured railroad worker earned from a lifetime of work.

Finally, the Writ of Certiorari should be denied due to the fact that this matter has been settled and the Judgment is now satisfied.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM TRANSCRIPT OF JURY TRIAL DATED JUNE 3, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-4411

Easton, PA
June 3, 1997
9:00 a.m.

DAVID NEWHARD,

Plaintiff,

vs.

PHILADELPHIA, BETHLEHEM AND NEW ENGLAND RAILROAD COMPANY,

Defendant.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
FRANKLIN S. VAN ANTWERPEN
UNITED STATES DISTRICT JUDGE

* * *

Appendix A

[Commencing at page 186]

* * *

MR. HAGGERTY: But then he shouldn't be able to stand here today and say, I'd be working on the railroad.

MR. ZERO: He certainly would be if it hadn't been for this incident, and he testified to that.

THE COURT: This requires — I'm aware of — I think it's *Brandt v. Vulcan*. It's a Seventh Circuit case back in '94. I'm aware that information about pensions can be used to impeach under some circumstances, but here, I have to weigh the probative value versus the prejudicial value, and I still come down on the side of saying that the extreme prejudice from that to the plaintiff, from that type of information, being in front of a jury, I think outweighs the probative value. So I'm still down on the side of not permitting it to come in.

MR. ZERO: Thank you, your Honor.

(Recess)

APPENDIX B — EXCERPTS FROM TRANSCRIPT OF JURY TRIAL DATED JUNE 5, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action 96-4411

Easton, PA
June 5, 1997
9:00 a.m.

DAVID NEWHARD,

Plaintiff,

vs.

PHILADELPHIA, BETHLEHEM and
NEW ENGLAND RAILROAD COMPANY,

Defendant.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
J. FRANKLIN S. VAN ANTWERPEN
UNITED STATES DISTRICT JUDGE

* * *

Appendix B

[Commencing at page 161]

With respect to lost wages, the rule is just the opposite. There we're talking about net income, take home pay, if you will. The lost wages must be based upon after tax net income. When I say take home pay, I mean after taxes. I'm not talking about any other deductions for you know, savings bonds or something like that. I'm strictly talking about after tax income.

Now if you find that the plaintiff's injuries are reasonably certain to continue beyond today, you must determine the life expectancy and the work life expectancy of the plaintiff, David Newhard. Now according to statistics testified to, the average life expectancy was 23.5 years. And the average work life expectancy was 7.5 years to 10.5 years for all persons whose sex, race and age is the same as that of the plaintiff.

Now these figures were testified to by Mr. Bunin. He took them from various published works. They're offered to you as a guide. They're not conclusive and you're not bound to accept them if you believe the plaintiff will live a longer or shorter time than the average person in the plaintiff's category. In reaching this decision you may consider the plaintiff's health prior to the happening of the alleged negligence, his manner of living, his personal habits, type of work and work habits, and any other factors that may affect the duration of his life and work life.

* * * *